Office - Supreme Court, U.S.
FILED
AUG 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2385

In the Supreme Court of the United States

OCTOBER TERM, 1982

BRUCE KING, GOVERNOR OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS

v.

FRANK I. SANCHEZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MARIE E. KLIMESZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the 1982 reapportionment of the New Mexico legislature, which employs a formula based on a combination of population and actual votes cast in the last general election and which results in districts with substantial population deviations, violates the "one-person, one-vote" principle in the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 7

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Burns v. *Richardson*, 384 U.S. 73 ..... 6, 7, 8, 9, 10

Davis v. *Mann*, 377 U.S. 678 9

Ellis v. *Mayor of Baltimore*, 352 F. 2d 123 8

Ely v. *Klahr*, 403 U.S. 108 8

Gaffney v. *Cummings*, 412 U.S. 735 ..... 7, 8

Lucas v. *Colorado General Assembly*, 377 U.S. 713 9

Mahan v. *Howell*, 410 U.S. 315 ..... 6, 9

Maryland Committee for Fair Representation v. *Tawes*, 377 U.S. 656 9

Reynolds v. *Sims*, 377 U.S. 533 ..... 8, 9, 11

Roman v. *Sincock*, 377 U.S. 695 9

Swann v. *Adams*, 385 U.S. 440 9

WMCA, Inc. v. *Lomenzo*, 382 U.S. 4 ..... 7, 9

Page

Constitution and statutes:

United States Constitution:

Fourteenth Amendment 2, 6, 7

Fifteenth Amendment 2, 6, 8

Civil Rights Act of 1964, Title IX, 42 U.S.C. 2000h-2 2

Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.* :

42 U.S.C. 1971(a)(1) 2

42 U.S.C. 1971(a)(2) 2

42 U.S.C. 1973 ..... 2, 6

Pub. L. No. 94-171, 89 Stat. 1023, 13 U.S.C. 141(c) 4

Pub. L. No. 97-205, Section 3, 96 Stat. 134 6

28 U.S.C. 2284 2

Miscellaneous:

41 Fed. Reg. 13639 (1976) 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2385

BRUCE KING, GOVERNOR OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS

v.

FRANK I. SANCHEZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

The Solicitor General, on behalf of the United States, moves, pursuant to Supreme Court Rule 16(1)(c), that the judgment of the district court in this case be affirmed.

OPINIONS BELOW

The April 8, 1982 memorandum opinion and order of the district court (J.S. App. B-1 to B-4) is not reported. The April 5, 1982 opinion of the district court granting a preliminary injunction (J.S. App. A-1 to A-3) is also unreported.

JURISDICTION

The order of the district court (J.S. App. B-1 to B-4) was entered on April 8, 1982. The notice of appeal (J.S. App. C-1 to C-2) was filed on April 29, 1982. The appeal was docketed on June 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. These consolidated suits, which were filed in the United States District Court for the District of New Mexico by voters in New Mexico against the Governor and Secretary of State, challenge the constitutionality of the 1982 reapportionment of both the State's Senate and House of Representatives. The complaints alleged that the reapportionment violated the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, 42 U.S.C. 1971(a)(1) and (2) and 1973, and various state statutes and constitutional provisions. A three-judge court was convened in accordance with 28 U.S.C. 2284. The United States was granted leave to intervene as a plaintiff, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2.[1]

Following a four-day trial, the three-judge court on April 5, 1982, entered a preliminary injunction postponing indefinitely the April 6, 1982, deadline for filing petitions of candidacy for the legislature (Pet. App. A-2 to A-3). On April 8, 1982, the court entered an order declaring the 1982 reapportionment unconstitutional as violating one-person, one-vote principles of the Equal Protection Clause of the Fourteenth Amendment (Pet. App. B-1 to B-4). The court therefore enjoined the primary election pending the adoption by the state legislature of a new reapportionment plan.[2]

---

[1]In the district court, the United States alleged that the reapportionment plan intentionally abridged the voting rights of Indians and Hispanics in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The trial in the district court was limited, however, to the Fourteenth Amendment Equal Protection claim.

[2]On April 13, 1982, appellants moved for a stay of the April 8 order pending appeal to this Court, or, in the alternative, for an injunction postponing indefinitely the June 1, 1982, primary election for all congressional, statewide and county offices. Appellants asserted that it

2. The 1982 House and Senate Reapportionment Acts of the 35th Legislature of the State of New Mexico provide the following formula for the purpose of allocating the State's population into the voting precincts which make up each legislative district:

$$\frac{\text{COUNTY POPULATION ACCORDING TO THE LAST OFFICIAL U.S. CENSUS}}{\text{TOTAL VOTE CAST IN THE COUNTY IN THE MOST RECENT GENERAL ELECTION}} \times \text{TOTAL VOTE CAST IN EACH PRECINCT IN THE MOST RECENT GENERAL ELECTION} = \text{DERIVED PRECINCT POPULATION}$$

The legislative "Findings of Fact" explain the State's decision to rely upon a formula emphasizing actual votes cast as opposed to using only general population data. They

---

would cause "great[] disruption, inconvenience, increased cost, and confusion" to hold a June 1 primary for non-legislative candidates and a later primary for the state legislature. The district court, on the same day the motion was filed, denied the stay of its prior order, but granted appellants' alternative motion to stay the entire New Mexico primary scheduled for June 1. Candidates for non-legislative offices were permitted to intervene to seek reconsideration of that order. Following the district court's denial of their motions for reconsideration, these private intervenors sought a stay in this Court to permit the non-legislative primary elections to proceed. *Bingaman* v. *King*, No. A-889 (1981 Term). On April 23, 1982, this Court entered an order staying the district court's April 13 order to the extent that it applied to other than state legislative offices, pending the timely filing and disposition of an appeal. That appeal has since been voluntarily dismissed.

state that the population data supplied by the Bureau of the Census generally do not correspond with the State's election precincts, and that redefining precinct boundaries to make the census data useable "would not only entail significant administrative cost but could not be completed in time for the holding of the 1982 primary and general elections" (J.S. App. D-3 to D-4, E-3).[3] The legislature also cited "gross errors" in the census data that had been collected in New Mexico (J.S. App. D-3, E-3).

The legislature also found (J.S. App. D-3, E-3) that the presence in the State of large numbers of persons who are either ineligible to vote, or who vote outside the precinct where they reside, *e.g.*, institutionalized persons, illegal aliens, university students and residents of military bases, causes the use of census data as the sole method of apportionment to weigh votes unfairly in some precincts (*ibid.*). According to the "Findings of Fact," the legislature's formula, using votes cast and population "comes closest to the spirit embodied in the 'one-person, one-vote' concept in that it eliminates unequal weight given to the votes of persons resident within districts containing large numbers of persons not eligible to vote" (J.S. App. D-4, E-4).

---

[3] In 1975, Congress passed a statute, Pub. L. No. 94-171, 89 Stat. 1023, requiring the Bureau of the Census to collect 1980 data on the basis of local boundaries, *e.g.*, voting precincts, if certain requirements were satisfied by the states, 13 U.S.C. 141(c). The Bureau published guidelines requiring jurisdictions participating in this program to present plans in which precinct boundaries "coincide with visible features readily distinguishable on the ground by a census enumerator * * *," 41 Fed. Reg. 13639 (1976). Additional alternatives made available to the states by the Census Bureau included options for states to assist the Bureau in defining enumeration districts and blocks, to purchase block figures for the entire state, and to purchase data from the Bureau splitting enumeration districts and blocks to match precinct boundaries. New Mexico chose not to participate in the Pub. L. No. 94-171 program or to exercise any of the other available options.

Appellees presented data from three experts to demonstrate the malapportionment caused by use of the legislature's formula. From the exhibits prepared by these three witnesses, 58 of the 70 House districts containing 82.7% of the State's population and 29 of the 42 Senate districts containing 69.25% of the State's population were analyzed.[4] A comparison in the 58 House districts between the calculated census population, created by the legislature's formula, and the ideal House district population (18,613)[5] produced an average deviation of 18.3% and a maximum deviation of 94% (J.S. App. B-2; Pl. Exhs. 5, 105, 114).[6] The same analysis performed for the Senate districts (ideal = 31,021) showed an average deviation of 13.13% and a maximum deviation of 83% (*ibid.*). For both House and Senate districts, the largest district is 2.4 times larger than the smallest district. Stated differently, for every 100 people in the smallest district, there are 240 in the largest district.[7]

---

[4]Dennis Stoudt, Chief of the Special Projects Branch of the Bureau of the Census, and his staff, calculated the population of the precincts in San Juan and McKinley counties (Pl. Exh. 2). Dale Glass, Deputy Director of the Middle Rio Grande Council of Governments, calculated the population for precincts in Bernalillo County (Pl. Exh. 1). Dr. James O. Williams, an expert in demography and population studies, analyzed an additional 29 House and 12 Senate districts (Pl. Exhs. 105, 106).

[5]The ideal district population is calculated by dividing the total population of the state by the number of House or Senate seats.

[6]The average deviation is calculated by adding the deviations for all districts and dividing by the total number of districts. The maximum deviation is calculated by adding together the percentage deviation of the largest and smallest districts.

[7]The United States and private plaintiffs also presented evidence that the disparities caused by use of the vote cast formula are not random but are significantly correlated with ethnicity, *i.e.*, districts in which the Indian and Hispanic population is high were consistently underrepresented, while districts with low minority group populations were consistently overrepresented (Tr. 169). The district court did not reach the

3. The district court held that the use of the votes cast formula for apportionment of the New Mexico legislature is "constitutionally impermissible" (J.S. App. B-2). The court recognized that the use of registered or actual voters as a basis for apportionment is not per se unconstitutional, but concluded that such plans can be sustained only when they produce " 'a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis' " (J.S. App. B-2, quoting *Burns* v. *Richardson*, 384 U.S. 73, 93 (1966). Here the disparities between the two plans were sufficiently great that they "emasculate[d] the goal of substantial equality" (J.S. App. B-2, quoting *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973)).

The district court recognized, however, that apportionment is primarily a legislative function, and therefore gave the legislature an opportunity to make a "good-faith effort to construct * * * legislative districts as nearly of equal population as is practicable" (J.S. App. B-3). While the court noted that no reason appeared why the State could not use the method employed by the Census Bureau to adapt census data to precinct boundaries, it explicitly disavowed any attempt to dictate to the legislature the method to be used in redrawing its plan (J.S. App. B-3 to B-4).[8]

---

question whether the votes cast formula denied or abridged the voting rights of Indians and Hispanics.

[8]On June 28, 1982, the Governor of New Mexico, one of the appellants here, signed into law House Bill 3 redistricting the House of Representatives in response to the district court's order. On July 12, 1982, the United States moved for a preliminary injunction against implementation of House Bill 3 and sought a hearing in the district court on its claim that a number of districts in the new reapportionment violate Section 2 of the Voting Rights Act, 42 U.S.C. 1973, as amended by Pub. L. No. 97-205, Section 3, 96 Stat. 134, and the Fourteenth and Fifteenth Amendments. A hearing was held on August 4-6 and 12-13, 1982. No decision has as yet been rendered by the district court.

ARGUMENT

Appellants focus virtually their entire argument (J.S. 6-14) on a "straw man" issue, *viz.*, whether the Fourteenth Amendment requires a state legislature to rely exclusively upon population statistics in reapportioning legislative districts. No one, and specifically not the district court, disputes that total population statistics are an imperfect means of measuring compliance with the one person-one vote principle, see *Gaffney* v. *Cummings*, 412 U.S. 735, 746-747 (1973), and that therefore the states in appropriate circumstances may employ different data bases for apportioning their legislatures. *Burns* v. *Richardson*, 384 U.S. 73, 94-95 (1966) (registered voters); *WMCA, Inc.* v. *Lomenzo*, 382 U.S. 4 (1965) (citizens). Indeed, the district court expressly recognized this principle and, in light of it, made clear that it was not instructing the State regarding what method should be employed in redrawing its plan (J.S. App. B-3 to B-4).

What is at issue in this case is whether the district court must totally disregard a finding of severe malapportionment based on population solely because the State has decided to use some other formula to apportion its districts.[9] The district court properly interpreted this Court's

---

[9]Appellants rely heavily upon this Court's discussion in *Gaffney* v. *Cummings*, 412 U.S. 735, 745-748 (1973), regarding the limits on the usefulness of total population statistics as a basis for apportionment. But appellants ignore the legal context in which that discussion arose. The Court was merely explaining why "minor deviations" (412 U.S. at 745) from equality among voting districts were insufficient to establish a prima facie case of discrimination. It was in no way suggesting that significant deviations (such as those involved in this case) in population among districts can be justified because population statistics are not perfect. The Court in *Gaffney* based its entire analysis on a reaffirmation of the requirement in *Reynolds* that districts be "as nearly of equal population as is practicable." *Gaffney* v. *Cummings, supra*, 412 U.S. at 742, quoting *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). Thus, the decision of the district court is fully consistent with *Gaffney*.

prior decisions as requiring the state legislature when adopting an apportionment scheme to be more sensitive about variations in actual population between districts than it was in the 1982 Reapportionment Acts, and the district court's judgment therefore should be affirmed.

In explaining how the one-person, one-vote principle should be implemented, this Court stated in *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964) (emphasis added): "Population is, of necessity, the starting point for consideration and the *controlling criterion for judgment* in legislative apportionment controversies." Consistent with that guideline, this Court approved the use of registered voters as the basis for apportionment in *Burns* v. *Richardson, supra*, 384 U.S. at 93, "only because on [that] record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." See also *Ely* v. *Klahr*, 403 U.S. 108, 115-116 n.7 (1971).[10]

---

[10]This Court recognized in *Burns* that use of a registered or actual voter base was fraught with a number of difficulties which called into question its appropriateness as an apportionment tool. *Burns* v. *Richardson, supra*, 384 U.S. at 92-93. Specifically, the Court noted that use of actual voter data, in contrast to eligible voter data, makes political activity the critical concern and, therefore, may "perpetuate under-representation of groups constitutionally entitled to participate in the electoral process" or "perpetuate a 'ghost of prior malapportionment.' " *Ibid.* Further, the Court recognized that registration and turnout are subject to "sudden and substantial" fluctuations caused by such factors as controversial issues, popularity of candidates, or inclement weather. *Id.* at 93, citing *Ellis* v. *Mayor of Baltimore*, 352 F. 2d 123, 130 (4th Cir. 1965). Finally, the Court noted that "registration figures derived from a single election are made controlling for as long as 10 years." 384 U.S. at 93. All of these factors were of concern to appellees in the court below because they worked a disproportionately adverse effect upon groups protected by the Fifteenth Amendment and by federal voting rights statutes.

Obviously, no similar conclusion can be drawn from the evidence in this case. When the districts created by the votes cast formula are compared on the basis of actual population figures, the deviations are striking. Thus, an apportionment based on population would be not at all comparable to that created by the votes cast formula, as required by *Burns*.

Indeed the deviations present in this case are as large as those involved in *Reynolds* v. *Sims, supra*, and its companion cases[11] and greater than those in any case presented to this Court since that time. While the Court has occasionally considered the question whether a particular numerical deviation was substantial enough to invalidate a plan and has cautioned that each case must be decided on its own facts rather than by using "specialized calipers" to measure the range of permissible mathematical deviations, the deviations here far exceed those said to "approach tolerable limits," *Mahan* v. *Howell*, 410 U.S. 315, 329 (1973).

Notwithstanding the severe malapportionment based on population, appellants argue (J.S. 12-14) that the situation is justified by the unique demographic problems in New Mexico. In this regard, we note that the Court in *Swann* v. *Adams*, 385 U.S. 440, 443-444 (1967), left open the possibility that deviations as high as 30% to 40% could be approved if the State were to provide a "satisfactory explanation grounded on acceptable state policy." See also *Mahan* v. *Howell, supra*, 410 U.S. at 328-329. But it is extremely dubious that deviations of 83% and 95%, such as those produced by the votes cast formula, could ever be justified without compromising the underlying constitutional principle articulated in *Reynolds* v. *Sims, supra*.

---

[11]See *WMCA, Inc.* v. *Lomenzo, supra*; *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

Moreover, the record in this case demonstrates clearly that the votes cast formula is not designed to accomplish effectively the State's purpose. The policy pursued by the State, *i.e.*, exclusion from the apportionment base of certain groups of persons ineligible to vote, is not itself improper.[12] But the formula was not shown to bear any relationship to effectuation of that policy. Three expert witnesses testified that the formula is not an accurate predictor of voting age population or of any other permissible subgroup of population (Tr. 55-56, 202, 1085-1086).

Rather than attempt to eliminate the ineligible voter population from its apportionment base through the use of a direct method, the State devised a unique formula that artificially attempts to "distribute the ineligibles over the entire county" (J.S. 4). By using votes cast as its method of distribution, the formula also excludes eligible voters who for whatever reason failed to vote in the last general election. Also excluded by the formula are persons who voted by absentee ballot.[13] Furthermore, the formula was used only in those counties that were split between legislative districts. Accordingly, the six counties that did not require splitting were apportioned on the basis of actual census population, in utter disregard of appellants' asserted purpose in using the formula. Finally, it was shown that in New

---

[12]In addition to those ineligible to vote because of age, conviction of a crime, or other legal disability, appellants sought to eliminate from the apportionment base persons "who either through their personal disinclination [or] some sort of disability, do not participate in [the State's] political process" (Tr. 792). Such a criterion obviously lends itself to the sorts of problems recognized by this Court in *Burns* v. *Richardson*, *supra*, as inherent in the use of voter registration figures. See note 10, *supra*.

[13]While the State asserted that absentee ballots were ignored because they were distributed fairly evenly throughout the State, it was shown at trial that some counties had absentee ballot rates of less than two percent while others had rates in excess of ten percent (Tr. 780-783).

Mexico a "disproportionate percentage" of people do not vote in the precinct in which they live, but instead return to the place where they grew up to cast their ballots (Tr. 718). Thus, "total votes cast" in a precinct or county may bear little relationship to the number of persons living in an area.[14]

In light of the severe malapportionment based on total population caused by the votes cast formula and the absence of a substantial state interest that is furthered by employing this formula, the district court was clearly correct in concluding that the votes cast formula does not fulfill appellants' obligation to make a "good faith effort to construct * * * [legislative districts] as nearly of equal population as is practicable" (*Reynolds* v. *Sims, supra*, 377 U.S. at 577).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MARIE E. KLIMESZ
Attorneys

AUGUST 1982

---

[14]Even the Director of Legislative Counsel Services for the State testified that the figures produced by the formula were wholly artificial (Tr. 788-791). He stated that the figure was called "estimated population simply because [they] didn't know what else to call it. One hardly passed a bill saying phony population" (Tr. 710).

DOJ-1982-08